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MCLE SELF-STUDY

Suspicious Minds: The Federal Telecommunications Act Converges with the Doctrine of Prior Restraints in the Ninth Circuit

*By Steven L. Flower**

"Why can't you see,
What you're doing to me,
When you don't believe a word I'm saying?"
Elvis Presley, "Suspicious Minds"

The ubiquity of cell phones in American life is dependent upon an expanding infrastructure of cellular towers, monopoles, and antennas. As these wireless facilities have multiplied, so too have confrontations between wireless service providers seeking to extend their networks and municipalities seeking to exercise their traditional zoning authority.

In California, the confrontation has until recently centered on two statutory provisions: Section 7901 of the California Public Utilities Code[1] and Section 332(c)(7) of the Federal Telecommunications Act of 1996 (the "TCA")[2]. The former entitles telephone service providers – including wireless service providers – to access the public right-of-way. The latter creates a federal cause of action for challenging individual zoning decisions that prevent the provision of wireless services or discriminate between service providers.

Now a third front has been opened by the Ninth Circuit's recent decision in *Sprint Telephony PCS v. County of San Diego* ("*Sprint Telephony PCS*"),[3] in which the court held that San Diego County's zoning regulations for wireless facilities were preempted by Section 253 of the TCA.[4] Although the language of Section 253 broadly preempts state and local telecommunication regulations, this marks the first time that any Circuit has held that wireless-facility regulations are subject to facial challenge under its provisions.

More worrisome for municipalities are the grounds on which the Ninth Circuit rested its decision. In a curious case of convergent evolution, the court subjected San Diego County's regulations to a standard normally reserved for prior restraints on free speech. Namely, the court held that regulations were a facially invalid barrier to the provision of telecommunication services due in large part to the broad discretion granted to local decision makers.

This paper argues that *Sprint Telephony PCS* was wrongly decided because local wireless facility regulations should not be subjected to the same degree of suspicion that is applied to prior restraints. Part I provides a brief review of the key provisions of the TCA. Part II then discusses the Ninth Circuit's decision in *Sprint Telephony PCS* and its two major errors. Part III argues that the court's errors led it to inappropriately treat the County's regulations as if they were prior restraints on free speech. Part IV concludes that municipalities will nonetheless have to adapt to *Sprint Telephony PCS* by scaling back the discretion granted to decision makers over wireless facility permitting decisions.

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I. THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

Congress enacted the TCA to reduce regulation of the telecommunications industry.[5] To this end, the TCA broadly preempts state and local regulations that prohibit or have the result of prohibiting telecommunications services, and limits the application of zoning ordinances to wireless facilities. The preemptive scheme of the TCA has two parts: Section 253, which broadly preempts state and local regulation of telecommunication services generally;[6] and Section 332(c)(7), which permits local control over wireless facilities so long as they do not prohibit or have the effect of prohibiting wireless services or discriminate between wireless service providers.[7]

Section 253 provides in part: "No State or local statute or regulation ... may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[8] In *Qwest Corporation v. City of Portland*, the Ninth Circuit held that "Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that *may* have the effect of prohibiting the provision of such services."[9] Local telecommunications-specific regulations are therefore preempted in the Ninth Circuit if, either alone or in combination, they create a "substantial barrier" to entry into or participation in a local telecommunications market.[10]

Despite the broad sweep of Section 253, local control over wireless facilities appeared to be preserved for the most part by Section 332(c)(7). Section 332(c)(7) is titled "Preservation of local zoning authority," and states in part: "Except as provided in this paragraph, nothing ... shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[11] This deference to local control is not without limits, however. Individual zoning decisions are still subject to challenge under Section 332(c)(7) if: (1) they prohibit or have the effect of prohibiting wireless services;[12] or (2) they unreasonably discriminate between wireless service providers.[13] The preemptive language of Section 332(c)(7) therefore overlaps to a great degree with Section 253, which applies to regulations that "prohibit or have the effect of prohibiting ... telecommunications service."[14]

The Ninth Circuit previously held in *MetroPCS v. City and County of San Francisco* ("*MetroPCS*") that a local zoning decision prohibits or has the effect of prohibiting wireless services under Section 332(c)(7) either when made pursuant to a general ban on wireless service facilities or when the decision prevents a wireless service provider from closing a significant gap in its service coverage.[15] Even if a wireless service provider demonstrates that the requisite "significant gap" exists in its network, however, it must also show that "the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."[16]

Moreover, under Section 332(c)(7), a decision to deny an application for a wireless service facility is subject to a "substantial evidence" standard.[17] Substantial evidence for these purposes means "less than a preponderance, but more than a scintilla of evidence. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[18] Therefore, a court may not overturn a city's decision to deny a cell phone tower application under Section 332(c)(7) of the TCA "if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence."[19] This standard mirrors the deferential standard applicable to administrative decisions under California law.[20]

II. *SPRINT TELEPHONY PCS V. COUNTY OF SAN DIEGO*

The zoning ordinance at issue in *Sprint Telephony PCS* contained many typical regulatory features. It required one of four types of use permits for wireless facilities, depending on the proposed location, height, and other features of the facility. Applications for a permit had to be accompanied by, among other things, a list of other wireless facilities in the area, a visual impact analysis, a description of the site and design plans, a fire service plan, and a landscaping plan. Applicants also had to agree to allow other service providers to co-locate on their facilities if technically and economically feasible.[21]

San Diego County's ordinance then vested decision makers with the discretion to grant the use permit only if "the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residences, or structures."[22] The ordinance contained a list of criteria to help them make this determination, but ultimately allowed them to consider "any other relevant impact of the proposed use."[23] The ordinance also required them to determine whether the proposed facility was appropriately "camouflaged," "consistent with community character," and designed to minimize any "visual impact."[24]

Sprint filed suit against San Diego County arguing that Section 253 preempted the ordinance because the permitting process was onerous and vested too much discretion in decision makers. Sprint sought to permanently enjoin enforcement of the ordinance and requested money damages under 42 U.S.C. § 1983. The District Court ultimately ruled that the ordinance was preempted by Section 253 but that Section 253 did not support a claim for damages under Section 1983.

Both Sprint and San Diego County appealed to the Ninth Circuit, which affirmed the District Count's decision in both respects.[25] The court held that Sprint could challenge the facial validity of the ordinance under Section 253, and that the ordinance was facially preempted because the combination of a multi-layered permitting process and open-ended discretion presented an impermissible barrier to participation in the local telecommunications market.[26]

There are two particularly troubling aspects to the Ninth Circuit's reasoning from the perspective of municipalities. The first is the fact that the court accepted Sprint's facial challenge. Zoning regulations are normally very difficult to attack facially because

plaintiffs must show that the there are no circumstances under which the law would be valid. The task is typically made even harder by the availability of administrative appeals, which allow decision makers to avoid an improper result before reaching a final decision.

The court in *Sprint Telephony PCS* acknowledged the difficulty of challenging the facial validity of wireless zoning rules by quoting its earlier decision in *MetroPCS*:

> Zoning rules – such as those that allow local authorities to reject an application based on "necessity" – may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision – which it supports with substantial evidence – can a court determine whether the TCA has been violated.[27]

Under this standard, Sprint should have been required to demonstrate not only that the ordinance prevented Sprint from providing wireless services at a particular location, but also that there were no circumstances under which the ordinance could permit anyone to provide wireless services.

Shockingly, however, the Ninth Circuit did not require Sprint to meet this burden. In fact, the court arguably turned the standard on its head by holding that the availability of administrative hearings and appeals and the discretion given to decision makers rendered the ordinance susceptible to facial challenge. These are precisely the features that normally make zoning regulations so difficult to challenge facially.

The second troubling aspect of the Ninth Circuit's decision from the perspective of municipalities is the court's suspicion of local discretion in land use matters. The court specifically cited the open-ended discretion given to decision makers over matters of "consistency with community character," "visual impacts," and camouflaging as features that had the effect of preventing wireless services.

The court's suspicion of local discretion is misplaced because broad administrative discretion is a traditional element of local zoning authority. For example, under California law, it is settled that local zoning authorities have the discretion to deny a conditional use permit based on a "general welfare" standard.[28] Under *Sprint Telephony PCS*, however, any significant discretion over wireless facility permits will now invite a facial challenge. Although Congress intended to limit local discretion over wireless facilities, surely it did not intend to eradicate it in the manner suggested by the Ninth Circuit's opinion.

III. WIRELESS ORDINANCES AS PRIOR RESTRAINTS

In holding that zoning ordinances are subject to facial challenge if decision makers are given too much discretion to approve or deny wireless facilities, the Ninth Circuit inadvertently employed a standard that is normally reserved for prior restraints.

A prior restraint is any requirement that a person obtain government approval before engaging in protected expressive activity. Such requirements have been so historically disfavored in First Amendment jurisprudence that they are deemed presumptively unconstitutional.[29] The government may overcome the presumption, however, if certain substantive and procedural requirements are met.

One such requirement is that the licensing scheme must provide standards for granting or denying a license that are sufficiently defined that they leave little or no discretion to decision makers. The fear is that absent such restraints, decision makers will engage in content-based censorship. When such standards are lacking, one need not apply for a license before challenging the facial validity of the law.

For example, in *City of Lakewood v. Plain Dealer Publishing Co.* ("*City of Lakewood*"), an ordinance required a permit to place newsracks on public property. The ordinance placed absolute discretion as to whether to issue a permit in the hands of the mayor, and a newspaper company challenged the facial validity of the ordinance. The Supreme Court held that such a facial attack was permissible in light of the unbridled discretion the city had vested in the mayor.[30]

The *City of Lakewood* Court identified two reasons for allowing facial challenges based on unbridled discretion. First, the Court reasoned that the mere fact that decision makers are given broad discretion over expressive activities could cause applicants to censor themselves regardless of whether decision makers ever engage in content-based censorship. As the Court explained:

> It is not difficult to visualize a newspaper that relies to a substantial degree on single issue sales feeling significant pressure to endorse the incumbent mayor in an upcoming election, or to refrain from criticizing him, in order to receive a favorable and speedy disposition on its permit application. Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship.[31]

Wireless service providers are clearly not susceptible to the same danger of self-censorship. Speech is subject to self-censorship because it can be modified by whatever degree the speaker believes is necessary to obtain approval of the licensing authority. In contrast, a wireless facility is essentially an all or nothing proposition. It can be modified in anticipation of concerns that local decision makers might have, but it would never be modified to such a degree as to render the facility useless. Thus, although it is not difficult to visualize a newspaper self-censoring in the face of unbridled discretion, it is very difficult to say the same of a wireless service provider.

The second reason given by the *City of Lakewood* Court was that a lack of guidelines makes it exceedingly difficult to identify and prove First Amendment violations. The Court said, "Without these [standards] *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."[32]

No such similar problem of proof exists with respect to local wireless facility regulations because motive, an inherent aspect of censorship, is essentially irrelevant to whether local regulations prohibit or have the effect of prohibiting wireless services. The Ninth Circuit has already held in the context of Section 332(c)(7) that demonstrating that local regulations prohibit wireless service requires showing that there is a blanket ban on wireless facilities or a significant gap in a wireless service network. The motives of decision makers never enter into it.

At bottom, the prior restraints doctrine is based on a profound suspicion of government action that stems from historical examples of censorship. Courts are therefore justified in subjecting prior restraints to the highest level of scrutiny available. Not even Equal Protection or Due Process claims warrant enough suspicion to allow facial challenges based on unbridled discretion. There is no reason to think that Congress intended challenges to local land use decisions under the TCA to be easier than they are under those constitutional provisions. Yet in *Sprint Telephony PCS*, the Ninth Circuit extended the same level of scrutiny to local wireless facility regulations that it normally reserves for the most fundamental of free speech issues.

IV. CONCLUSIONS

Nothing in *Sprint Telephony PCS* suggests that the court intentionally set out to treat wireless facility regulations as if they were prior restraints. The court's evident suspicion of local discretion will nonetheless lead to more facial challenges under Section 253 of the TCA based on claims that decision makers have been given too much discretion. Municipalities should therefore take steps to defend themselves.

First, municipalities should review their ordinances and curtail the discretion granted to decision makers over wireless facility permits. This does not mean that wireless facilities need to be allowed by right, but it does mean that decision makers should be given explicit criteria for deciding whether to approve a proposed facility and should not be allowed to consider whatever information they might deem relevant. Decision makers may also still consider aesthetic impacts, but should be given clear standards regarding permissible heights, color, materials, and camouflaging.

Second, if and when a municipality's wireless regulations are challenged under Section 253, it should argue that *Sprint Telephony PCS* was wrongly decided because it inappropriately applied a prior restraints test outside of the free speech context. In the alternative, effort should be made to make sure that plaintiffs meet their burden to state a facial challenge. There is room yet to argue that a facial challenge based on allegedly unbridled discretion is inappropriate where administrative appeals leave open the possibility that decision makers will not apply local regulations in a manner that prohibits wireless services.

ENDNOTES

[1] *See, e.g.*, *Sprint Telephony PCS v. County of San Diego*, 44 Cal. Rptr. 3d 754 (2006), review granted by 143 P. 3d 654 (2006).

[2] *See, e.g.*, *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 730-33 (9th Cir. 2005). The TCA was enacted as Public Law No. 104-104,110 Stat. 56.

[3] 490 F. 3d 700 (9th Cir. 2007).

[4] 47 U.S.C. § 253.

[5] *See Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1255 (9th Cir. 2006).

[6] 47 U.S.C. § 253(a).

[7] 47 U.S.C. § 332(c)(7).

[8] 47 U.S.C. § 253(a).

[9] 385 F.3d 1236, 1239 (9th Cir. 2004) (emphasis added) (internal quotation omitted). A split exists between the Ninth and Eighth Circuits on this point. *Cf. Level 3 Communications, L.L.C. v. City of St. Louis,* 477 F.3d 528, 532 (8th Cir. 2007) ("...a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.").

[10] *See City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1176 (9th Cir. 2001).

[11] 47 U.S.C. § 332(c)(7)(A).

[12] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[13] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[14] *Compare id. with* 47 U.S.C. § 253(a).

[15] *See* 400 F.3d 715, 730-33 (9th Cir. 2005).

[16] *Id.* at 734 (internal citations and quotations omitted).

[17] 42 U.S.C. § 332(c)(7)(B)(iii).

[18] *MetroPCS*, 400 F.3d at 725 (internal citation and quotation omitted).

[19] *Id.*

[20] *Cf.* CAL. CIV. PROC. CODE § 1094.5(b) ("Abuse of discretion [in quasi-adjudicatory decisions] is established if ... the order or decision is not supported by the findings, or the findings are not supported by the evidence.").

[21] *See* 490 F. 3d at 705-706.

[22] *Id.* at 706.

[23] *Id.*

[24] *Id.*

[25] Although not the focus of this paper, the Ninth Circuit's holding that Section 253 of the TCA does not support a claim for damages under Section 1983 is also significant. The Supreme Court had previously held that Section 1983 did not support a claim for damages under Section 332(c)(7), *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-121 (2006), and the Ninth Circuit recently held that compensatory damages are not directly available under Section 332(c)(7). *See Kay v. City of Rancho Palos Verdes*, — F.3d —, 2007 WL 2743578, *5-7 (9th Cir. 2007). Taken together, these cases appear to immunize municipalities from all claims for damages under the TCA.

[26] *See id.* at 715-716.

[27] *Id.* at 711 (*quoting MetroPCS*, 400 F.3d at 724)

[28] *See, e.g.*, *Hawkins v. County of Marin*, 54 Cal. App. 3d 586, 591-592 (1976).

[29] *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[30] *See* 486 U.S. 750, 755-756 (1988).

[31] *Id.* at 757.

[32] *Id.* at 758.

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Earn one hour of MCLE Self Study Credit by reading the article titled "**Suspicious Minds: The Federal Telecommunications Act Converges with the Doctrine of Prior Restraints in the Ninth Circuit**" on pages 1-5 and answering the below questions, choosing the one best answer to each question. This MCLE Test is valid for one year from the date of publication.

1. In California, the confrontation between municipalities and wireless service providers has only involved issues of state law.
❏ True ❏ False

2. The Ninth Circuit decision in *Sprint Telephony PCS v. County of San Diego*, held that San Diego County's zoning regulations for wireless facilities were preempted by Section 253 of the TCA.
❏ True ❏ False

3. Congress enacted the TCA to increase regulation of the telecommunication industry.
❏ True ❏ False

4. In *Qwest Corporation v. City of Portland*, the Ninth Circuit held that Section 253(a) only preempts regulations that prohibit the ability of any entity to provide telecommunications services.
❏ True ❏ False

5. Despite the preemptive language of Section 253, the author believes local control is preserved by Section 332(c)(7) of the TCA.
❏ True ❏ False

6. The Ninth Circuit previously held in *MetroPCS v. City and County of San Francisco* that a local zoning decision can never have the effect of prohibiting wireless services under Section 332(c)(7).
❏ True ❏ False

7. A public agency's decision to deny an application for a wireless service facility is subject to review under the "fair argument" standard.
❏ True ❏ False

8. The zoning ordinance at issue in *Sprint Telephony PCS* contained many typical regulatory features.
❏ True ❏ False

9. Sprint filed suit against San Diego County arguing that Section 253 preempted the ordinance because the permitting process was onerous and vested too much discretion in decision makers.
❏ True ❏ False

10. The author disagrees with the court's reasoning that the ordinance was facially invalid.
❏ True ❏ False

11. The author agrees with the court's suspicion of local discretion in land use matters.
❏ True ❏ False

12. A prior restraint is typically any requirement that a person obtain government approval before engaging in protected expressive activity.
❏ True ❏ False

13. The government may restrict expressive activity in certain situations.
❏ True ❏ False

14. In *City of Lakewood v. Plain Dealer Publishing Co.*, the court held that an ordinance which required a permit to place news racks on public property gave the mayor too much discretion.
❏ True ❏ False

15. In *City of Lakewood*, the court also held that the lack of guidelines in an ordinance could allow for facial challenges based on unbridled discretion.
❏ True ❏ False

16. The prior restraints doctrine is based on the suspicion of government.
❏ True ❏ False

17. The author believes the holding in *Sprint Telephony PCS* will lead to more facial challenges of local regulations.
❏ True ❏ False

18. In light of *Sprint Telephony PCS*, municipalities should review their ordinances and increase the discretion granted to decision makers over wireless facility permits.
❏ True ❏ False

19. In the author's opinion, if a municipality's wireless regulation is challenged under Section 253, it should distinguish *Sprint Telephony PSC*.
❏ True ❏ False

20. The author opines that it still may be argued that a facial challenge to a municipality's wireless regulation based on discretion is inappropriate.
❏ True ❏ False

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Ann Miller Ravel Honored as the 2007 Public Lawyer of the Year

Each year, the Public Law Section presents its "Public Lawyer of the Year" award to a public law practitioner who has made significant and continuous contributions to the profession. The Section's Executive Committee is pleased to have selected Ann Miller Ravel as the 2007 Public Lawyer of the Year. The award was presented to Ms. Ravel by Chief Justice Ronald M. George during the State Bar of California 2007 Annual Meeting in September in Anaheim.

Ms. Ravel is the County Counsel of the County of Santa Clara. She graduated from Hastings Law School in 1974, and has practiced civil law in various areas of the law since that time, with an emphasis in political law and ethics, labor and employment, and civil rights litigation. She has broadened the scope of the Santa Clara County Counsel's office to include the award-winning Elder Abuse litigation team, the Educational Rights Project, and Impact Litigation, plaintiff's litigation on behalf of the County and the citizens of the community to enforce their legal rights.

Ms. Ravel received the Woman of Achievement Award from the San Jose Mercury News and the Commission on the Status of Women for "professions" in 1980, the Elizabeth Ent Award for Contributions to Law and Justice in 1995, the 2001 Professional Lawyer of the Year Award presented by the Santa Clara County Bar Association, the American Bar Association Award for State and Local Government Law Advocacy presented in 2002, the Unsung Hero Award by the Santa Clara County Bar Association, and the Circle of Service Achievement Award by the California State Association of Counties in 2004.

In addition, Ms. Ravel served as the representative for District 3 to the State Bar Board of Governors from 1995 through 1998 and as the president of the County Counsel's Association from 2004 to 2005. She was also a member of the Judicial Council of the State of California from 2002 through 2005.

Ms. Ravel is currently a lawyer representative to the U.S. District Court, Northern District of California, a member of the President's Blue Ribbon Commission on Diversity in the Legal Profession in Silicon Valley, and a member of the State Bar Committee on Professional Responsibility and Conduct. Additionally, she has many Bar Association and teaching affiliations, and has served on numerous commissions and task forces with a particular emphasis on standards of professionalism and ethics.

The Public Law Section congratulates Ms. Ravel on this well-deserved distinction and her tireless work in public law, particularly her achievements in support of underserved citizens of California.

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A Message from the Chair

By Mark L. Mosley

It is an honor to chair the Public Law Section Executive Committee into 2008. I have a difficult act to follow because there is no way anyone could match the boundless energy and enthusiasm of Betty Ann Downing. My principal goal for the coming year will be to build on the momentum she generated during her tenure, and to undertake a few new initiatives to help serve the Public Law Section's broad membership.

I want to use this occasion to ask all California lawyers who work in and with the public sector to renew their commitment to public service and to excellence in the practice of public law. As practitioners in our great State, we have almost endless opportunities to apply our skills and knowledge to assist and improve our many public institutions, and thereby to enhance the quality of life of our fellow citizens. This is an important privilege that we share.

Our Public Law Section Executive Committee is comprised of attorneys who have devoted some, most, and in many cases all of their careers to public service. Our membership includes city attorneys, county counsel, other public entity lawyers from all across our State, and lawyers in private practice who advise and represent those public entities. We publish the *Public Law Journal* and *Public Law E-News*, an electronic newsletter, to help keep public sector lawyers abreast of the latest developments that effect our public entity clients. Each year we sponsor (and in many cases teach) dozens of continuing legal education programs on topics of interest to public sector attorneys, and we select the recipient of the Public Lawyer of the Year Award to honor one of our State's outstanding practitioners in our many fields of practice.

If you are interested in serving on our Executive Committee, or if you have an idea for an article you have always wanted to write, a course to teach or lecture to give, I invite you to contact us. We have a fun, committed, diverse group of attorneys and we would love to work with you.

A Message from the Immediate Past Chair

By Betty Ann Downing, Esq.

In this, my last Message from the Chair, I'd like to express my gratitude to those with whom I have served on the Executive Committee during the past four years. The energy and effort devoted to the Public Law Section by very busy attorneys is extraordinary. Each year Executive Committee members volunteer countless hours on MCLE programs, publications, events and other activities.

During this past year the Publications Subcommittee continued our history of newsletter excellence with each *Journal* published, the Technology Subcommittee launched *E-News* to inform members, our Public Lawyer of the Year Award subcommittees orchestrated another annual classy event, and our Education Subcommittee organized almost 20 MCLE programs. An impressive list of accomplishments by remarkably dedicated individuals.

I look forward to serving on the Executive Committee as the Past Chair through fall 2008, and working on our new Elections Code.

With sincere appreciation for all current and former PLS Executive Committee members with whom I have worked,

- Betty Ann

Public Lawyer of the Year

Remarks of Chief Justice Ronald M. George

Award Ceremony, September 28, 2007

Good afternoon. I am pleased to return once again to participate in conferring the Public Lawyer of the Year Award. Each year I enjoy attending this event, because it highlights the remarkable contributions made by public lawyers to the administration of justice in our state. As a lawyer with more than 40 years spent in the public sector, I know both how satisfying this area of practice can be – and how important it is that individuals of experience and intelligence like yourselves commit your careers and your skills to serve the public interest.

Each year that I have participated in this event has seen a lawyer with a different focus recognized by his or her peers. Ann Ravel, County Counsel of Santa Clara County, is this year's very worthy recipient of the honor you bestow.

Ann began her career as a lawyer with the Santa Clara Superior Court, serving as a law clerk in the Civil Law Appellate Department. She moved on to private practice for a brief time, and began her service with the County Counsel's Office in 1977. Ann, I congratulate you on 30 years of service to the office, the last nine as its head.

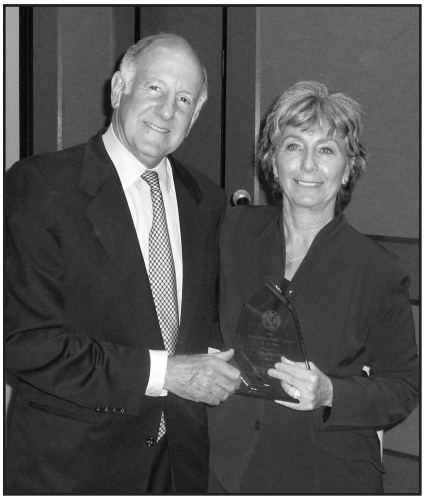
In her position as County Counsel, Ann serves as attorney for the County Board of Supervisors and all departments and agencies of the County. The County employs more than 15,000 individuals, and its budget is almost four billion dollars. She also serves in a similar capacity as counsel for the County's Special Districts, the Grand Jury, and numerous other independent entities. The range of advice she provides would make any private law firm proud — including tax, ethics, health and hospital law, labor and personnel issues, constitutional law, litigation, legislative matters, and subjects such as the Public Records Act, the Brown Act, and election law.

Over the years, she has taken a leadership role in stressing ethics, and initiated new programs such as the Elder Financial Abuse Task Force, which recovers funds and assets for elderly individuals, and the Educational Rights Program, which aims at ensuring that dependents and wards of the juvenile court are enrolled in and attending appropriate school programs. Ann also created the Affirmative Litigation Group in the County Counsel's office to pursue actions to recover damages for the County and its residents arising out of unfair business practices, anti-trust violations, and false claims.

Ann has served as a frontline litigator, as well as supervising litigation conducted by her employees. She developed her notable administrative skills as she moved through increasingly responsible positions in her office. And throughout her career she has been active in a wide range of activities to improve the administration of justice.

She has focused her attention on areas such as improving diversity in the legal profession, mentoring young lawyers through an Inn of Court (of which she is a former president), and actively participating in organizations comprising government and public sector lawyers. Her activities with the Santa Clara County Bar Association are too numerous to mention.

She also has an impressive record of community service, emphasizing education in a variety of contexts, and including a seat on the Board of the Hispanic Development



Council, pro bono activities for the Tri-Cities Children's Center, and service with the Child Development Resources of Ventura County.

Not too surprisingly, Ann has received recognition from a number of different organizations. She was the recipient of the "Unsung Hero Award" from the Santa Clara County Bar Association, which also honored her as Professional Attorney of the Year. The American Bar Association bestowed on her its State and Local Government Law Advocacy Award. She has been honored by various women's organizations, and in 2004-2005 she was selected as the first woman President of the County Counsels' Association.

The Judicial Council, which I chair, is the constitutionally created body charged with oversight of the statewide administration of justice. Four attorney members are selected by the State Bar Board of Governors to serve on the council, and Ann joined the council in 2002, serving until 2005. In that capacity, she provided very useful background and keen observations that assisted the council as

it developed and adopted projects and programs to improve the administration of justice in our state.

One outgrowth of her participation on the council was the inclusion of the County Counsels' Association in the round of yearly meetings I hold in my chambers with different groups of stakeholders in the judicial system. She led the first group of county counsels with whom I met, and these sessions have continued to provide a useful forum for the exchange of information and increased collaboration between that group and the judicial branch.

With this resume, it is difficult to see how Ann has time for anything else. Nevertheless, she does. She spends time with her husband, Steve, also a lawyer, and her three children – all of them out of the house and one of them in law school. I also have it on excellent authority — my principal attorney, Beth Jay — that Ann finds time to pursue her passion for shoes and purses on shopping trips with friends, and that her dog, Oskie, provides a constant source of entertainment and occasional reminders that not everything in life is always predictable. Ann Ravel is truly an excellent choice to receive this valued award.

Recent events have thrust attorneys serving in public positions into the forefront of the news, sometimes not in a flattering light. Perhaps the one good thing that may have come out of the questions raised about the role of public counsel has been the almost universal shock that such individuals ever would be urged to proceed based on anything other than the public interest. This reaction suggests that the position of public attorney is recognized as one in which the people of our nation and our state have placed great faith. By and large, this trust has been well-deserved. Individuals such as the one we honor here today demonstrate time and again that they regard the role of a public attorney as a profound responsibility and a great privilege.

As Chief Justice of California, and as a fellow public employee, I thank all of you for your service to the people of California. And I offer my deepest congratulations and thanks to Ann for her leadership, creativity, and commitment to serving the people of Santa Clara County and the entire state of California.

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Remarks of Ann Miller Ravel Public Lawyer of the Year

Award Ceremony, September 28, 2007

Having devoted most of my career to the practice of public law, it is particularly meaningful to be acknowledged by lawyers who understand the complexity and subtlety of public practice. Thank you.

I am also particularly honored that the presenter is Chief Justice of California. The Chief's remarkable achievements as the leader of the California Judiciary are an inspiration and an example of the highest values of public service. Under his leadership the judiciary has become stronger and more effective. His innovations have resulted in a unified trial court with increased access to the courts for all Californians - not just those who can afford it - as well as improved services, better administration of justice, and an increased awareness of the important role of the courts in our system of government.

This creativity and the ability to move beyond the traditional role is exactly what I believe is the ultimate responsibility of public lawyers - to think of novel ways to achieve better service for our clients and to the public that our clients represent.

The fact that I became a public lawyer was not by chance.

L-R: Chief Justice George, Ann Ravel, Betty Ann Downing

My parents were remarkable people who instilled in me a life long belief that our lives should be committed to a purpose higher than our own material wellbeing, that we must strive to make people's lives better. This came from two people who themselves grew up in grinding poverty and misery. My mother was orphaned at the age of 11. She and her three sisters barely survived on their own in the slums of Brazil. My father was abandoned as a baby and raised by an abusive uncle. But, despite this, by their words and their actions they taught me to devote a meaningful part of my life to the public good.

The lawyers in my office work hard to make our County a healthier, safer, and better place to live. They go to court each day to make sure that children have the best possible chance in life, and are not subjected to abuse or neglect. There are others who ensure that the livelihood and property that our seniors have worked so hard for are not stolen by their family members, care givers, or banks and other institutions that should be protecting their interests. Others work to enforce building standards to protect the community from fires that could devastate whole neighborhoods and destroy wildlife. We make people's lives better, and in some cases, our legal work actually saves lives.

These are part of a public lawyer's core functions and it is important work. But I believe that we must also constantly challenge ourselves to expand the ways to meet the needs of the community. When I became the County Counsel in 1998, I realized that public lawyers have enormous power and ability to effect social change through the law, and to use the law to remedy social problems that affect our community.

I am particularly proud of the innovative programs and solutions that we have developed in my office to address the quality of life in Santa Clara County. And, I am fortunate because I have a Board of Supervisors that cares deeply about social justice and is unafraid to use the law to remedy problems.

A few years ago a juvenile delinquency judge told me about the large number of children in the system with unmet special education needs. I learned that at least 20% of juvenile court dependents and more than 30% of juvenile court wards have special education needs. In addition to these needs, these children experience a host of other challenges in school - including multiple school placements because of court ordered residence changes, lost school records, and discipline problems. Most have no parent willing or able to advocate on their behalf for appropriate educational services, and so they have been, for the most part, ignored. Studies are clear that the failure to provide appropriate education for children at risk results in increased school dropout or truancy behavior, criminal behavior, and teen pregnancy.

So our office created the Educational Rights Project to ensure that these youth in the County system receive the educational services they need to secure their future successes in life. We work with the schools to make sure that these children's needs are not overlooked.

ELDER ABUSE PROJECT

The County is also the legal decision-maker for hundreds of the County's most vulnerable adults. Many of them are elderly, frail, and suffer from dementia. They are

unable to make necessary decisions to provide for their personal needs or to manage their finances. Our office, with the Public Guardian, has created a program to prosecute civil actions to recover assets taken from these people as a result of financial exploitation. We have recovered millions of dollars from those who have exploited our seniors, and have enabled the seniors to live better lives.

AFFIRMATIVE LITIGATION

When I became County Counsel, our litigation efforts were mostly responsive to lawsuits filed against the County. I started the impact litigation program to fulfill the social justice goals of the client, by helping those in the county most in need of access to the judicial system.

My very first case was brought to require paint companies who sold lead paint to be responsible for the health problems that our children were experiencing due to exposure to toxic lead in the paint. The news these days is full of stories about lead paint in toys from China. But in our own backyards, thousands of children are exposed to large quantities of lead in their older homes in poorer neighborhoods. The residents, and the public entities, simply do not have the resources to remedy the problems caused by this poison. So, many public entities with pervasive lead paint problems have joined in our litigation. The case has been hard fought, and has been to the Court of Appeal and back, but we hope one day to be successful in remediating the problems caused by this public health situation.

We have also brought many successful suits against corporations for their unscrupulous business dealings with the County. For instance, the County brought cases against natural gas suppliers and electricity companies seeking recovery of overcharges which occurred during the energy crisis, and have settled with a number of the companies.

One of the most recent examples of change that we have been influential in bringing about is the alcopops case. Last year we filed a case against the State Board of Equalization demanding that the Board tax the sweetened alcoholic drinks at a rate equivalent to distilled spirits. Although these drinks have been taxed as beer, they are only beer in name. They begin as beer, and then are distilled down and spirits are added. Taxing them this way has had dire consequences in this State. It means much less money to the State, and also that they can be sold at convenience stores where it is much easier for minors to be able to buy them than in liquor stores. This case has resulted in the SBE, last month, changing the rules to require them to be taxed at the higher rate. The case has heightened the attention of the State Legislature, which has enacted a bill to require labeling of such alcoholic beverages.

Our work shows that legal work at the local government level can make real and dramatic changes and can be used to protect vulnerable residents, taxpayers, and consumers. It is not without controversy that we do these cases. But in talking about local governments acting as the laboratories of change, Justice Lewis Brandeis said that a single courageous local government can try novel social and economic experiments, and "we must let our minds be bold."

I have been fortunate to have many wonderful people help me in my endeavors to be "bold" and to use the power of my position to effect change. Present here are many people from the County of Santa Clara - including my management team, and also many of my County Counsel colleagues from throughout the state who give generously of their advice and assistance.

Finally, I must say that one of my proudest achievements is having passed this spirit that was passed to me by my parents, to my own children. One of my sons, who is now in his second year of law school, wrote me a letter a couple of years ago. The letter still makes me emotional when I read it, but one thing stood out. He wrote: "In case you didn't already know, you are my inspiration for wanting to do public service as a career."

It has been said that "finding the right work is like discovering your soul in the world." Being a public lawyer is the right work. Thank you very much.

*The Public Law Section of the State Bar of California wishes to extend its heartfelt **appreciation** to the following **sponsors** of the 2007 Public Lawyer of the Year award ceremony and reception honoring Ann Miller Ravel:*

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Of Pot Holes and Landmines:

The Public Agency Attorney's Role in a Criminal Ethics Investigation of an Official

*By Grover Trask**

Public integrity is about the public's trust in its elected and appointed officials, and those who serve such officials, to act for the public good. Public integrity requires everyone who serves the public to do so in a fair and impartial manner, free from improper influence, illegal and corrupt activities, and self-dealing. Public integrity is achieved when proper systems are in place to educate officials about ethics laws, ensure compliance and hold accountable those who breach the public trust. With the growing number of headlines identifying officials who have allegedly broken the law or put their personal financial interests before the public's interests, the manner in which a public agency responds to such allegations is critically important to maintaining the integrity of the public agency and those who serve it. Because a public agency's legal counsel is often the first one asked to respond when there is an ethical question or issue, he or she should be aware of the potential pot holes and landmines that lie ahead.

Most of California's public officials have high ethical standards and perform their public and fiduciary duties beyond reproach. But what happens when a public official violates the public's trust through self-dealing, illegal conduct or improper influence peddling? The consequences can be catastrophic for both the public official and his or her public agency.

Recent newspaper headlines exemplify the growing problem:

- *"former mayor indicted for allegedly pressuring city officials to issue permits to his daughter's day care center while he was in office and hiding his financial interest in the facility"*
- *"for a city still trying to recover from corruption scandals that sent top elected leaders to prison, revelations this week of personal charges on a councilman's city-issued credit card has thrown [the city's] politics into turmoil"*
- *"community college district administrator found guilty of ten felony charges, including conflict of interest, misappropriation of public money and grand theft"*
- *"ex-lawmaker sentenced to two years in prison because his crimes were the result of a significant and serious abuse of the public trust...The illegal gifts included a golfing trip to Scotland by private jet, use of skyboxes at sporting events, meals, and concert tickets"*
- *"the District Attorney's office has asked the water district to justify its use of customer money to pay for employee parties, luncheon gifts..."*

These ubiquitous headlines have significant negative impacts on a community and fuel the public's cynicism about the ethics of public officials. The headlines also serve as fodder for the political pundits' negative and cynical commentary, like: *"An honest politician is one who, when bought, will stay bought"* or *"I am not a politician and my other habits are good."* And then there are the rhetorical jokes, such as: *"What's the difference between baseball and politics? In baseball '<u>you're out</u>' if you are caught stealing."*

Despite the recent high profile corruption cases at both the local and national level, public misconduct of appointed and elected officials has been with us ever since organized government was first created. However, it wasn't until the Watergate scandal in the early 1970's that both the federal government and many states throughout the nation passed many of the toughest laws against official misconduct. It is these laws and how they are enforced that public agency lawyers need to fully understand in order to avoid the many pot holes and landmines that await the public entity and its appointed and elected officials. Every public agency lawyer knows the conflict of interest laws and the intentional acts that constitute a violation of the laws, but what public lawyers may not know is how unintentional acts and reactions to alleged wrongdoing can make the situation worse for themselves and the clients they serve.

I. CALIFORNIA'S POLITICAL REFORM ACT

In 1974, California voters took the lead and overwhelmingly passed the 1974 Political Reform Act ("PRA"), which is codified in 81000 *et seq.* of the Government Code. This series of ever-changing statutes regulates many of California's financial conflict of interest and campaign laws for appointed and elected officials.

Government Code 81001(b) clearly states the intent of the law: **"Public officials, whether elected or appointed, should perform their duties in an impartial manner free from bias caused by their own financial interests or the financial interests of persons who have supported them."**

It is important for everyone advising public officials on potential conflict issues to understand that the PRA created a set of ethical rules and regulations that focus on a broad objective disqualification standard for both actual and apparent conflicts.

Any time there is a financial effect on the official's personal economic interest which reasonably could result from the governmental decision, the official must not be involved in the decision making in any way. The most important proactive step for a public agency attorney is to recognize the economic interests from which conflicts of interest can arise. The Fair Political Practices Commission ("FPPC") provides an eight point step-by-step process that helps answer this sometimes complex issue (www.fppc.ca.gov). Whether the matter involves gifts or other direct or indirect economic interests, the fact patterns and landmines are both limitless and sometimes mind boggling. Each query by a public official about his or her ethical responsibilities requires the agency attorney to engage in detailed analysis and provide sound legal advice.

While the FPPC is charged with primary oversight of the PRA and its civil enforcement, each county's District Attorney has primary authority over local officials as it relates to potential criminal liability. The District Attorney's office also has jurisdiction for violations by state elected officials occurring within their respective territories in cooperation and consultation with the Attorney General. The most common investigations are illegal contracts involving either direct or indirect personal financial dealings of a public official (Gov. Code, § 1090), misappropriation or misuse of public funds (Penal Code, § 424), embezzlement (Penal Code, § 503), and fraud (Penal Code, § 487). Most recently, prosecutors have also intensified their inquiries into violations of the open meeting laws contained in the Brown Act (Gov. Code, §§ 54950 *et seq.*).

When a prosecutor inquires into criminal conduct by a public official, the PRA is merely the starting point for review of ethical compliance standards and potential criminal liability. The threshold questions are whether the matter is criminal or civil in terms of the illegal conduct and what are the available enforcement tools to ensure compliance.

II. HOW DOES THE D.A.'S OFFICE INVESTIGATE AND EVALUATE AN ALLEGATION OF WRONGDOING BY A PUBLIC OFFICIAL?

Most District Attorneys have established guidelines and procedures to investigate and evaluate any allegations of misconduct in public office and the larger District Attorney's offices have public integrity units with specially trained prosecutors and investigators. It is important for public agency attorneys to know the District Attorney's local practices and policies to better deal with an investigative inquiry.

Generally, the investigation will be closed if the prosecutor decides: (1) it is inconsequential, (2) there is insufficient evidence, (3) it does not warrant criminal charges, or (4) it should be referred to the FPPC for civil enforcement action. If the District Attorney completes the investigation and determines that a criminal violation has occurred, the case is then evaluated for its level of seriousness in terms of appropriate criminal liability and consequences.

The following are some of the factors considered by prosecutors in determining whether a violation should be prosecuted administratively, civilly or criminally:

- the seriousness of the offense and conduct;
- the culpability of the suspect;
- whether the violation was inadvertent, negligent or deliberate;
- whether the suspect acted in good faith;
- the actual and potential harm to the public;
- whether the conduct is an isolated event or shows a pattern of criminal conduct;
- the existence of any prior criminal or civil PRA violations;
- the motive of the defendant; and
- any actual or potential gain to the defendant.

As a general rule, if the violation involves statutory provisions of the PRA and civil enforcement is appropriate, many prosecutors will defer the matter to the FPPC. This includes most citizen and law enforcement complaints involving potential violations of the PRA. These matters may involve failure to file timely and accurate Statements of Economic Interest, as well as minor gift and campaign violations. However, when the prosecutor decides to pursue a criminal investigation, there are eight proactive steps for a public agency attorney to take, as outlined below.

III. EIGHT STEPS FOR PUBLIC AGENCY ATTORNEYS WHEN THE PROSECUTOR MAKES AN INQUIRY

1. Develop a Full and Fair Record of What Actually Occurred

Once a public official or employee of your agency is under investigation, schedule a time to meet with all the appropriate staff that have information or may be involved. Interview the individual suspected of the alleged violation and any potential witnesses. If the District Attorney has opened an investigation, cooperation and open communication will enhance the agency's credibility once the matter becomes public. Know all the facts! The conflict of interest laws are incredibly complex and factually dependent. Providing competent legal advice to the agency (your client) requires a clear understanding of specific allegations of what occurred.

The District Attorney's investigation is closed and confidential until charges are filed. Do not expect to rely on their investigation for your factual basis of what occurred. Your client will want facts and advice before the District Attorney is willing to provide such information.

2. Define Your Role and Explain Who You Represent

When communicating with the individual who may be charged with committing a criminal ethics violation, explain that the public agency attorney represents the

agency and not constituent members thereof. This is critical where the alleged wrongdoer is an elected or appointed board member. California Rules of Professional Conduct, Rule 3-600, provides that in the case of representation of an organization, the client is:

> "the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement."[1]

Rule 3-600 contains the additional requirement that a member of the Bar must not mislead a constituent member of an organization client into thinking that the constituent is the client.[2]

3. Confidentiality

Do not advise the individual board member or any employee under investigation or charged with committing an ethical violation that their communication is in confidence. This is a violation of Rule 3-600(D) of the California Rules of Professional Conduct. Unless the public agency's attorney has obtained informed written consent under Rule 3-310[3], constituent members of entities are not the client. Therefore, attorney-client confidentiality under California Rules of Professional Conduct, Rule 3-100 does not apply. Public agency attorneys have an ethical obligation to disclose information to the highest authorized entity, which is their agency.

4. Cooperate With Investigation, But Maintain Your Client's Confidentiality

In most illegal conduct cases the prosecutor will request information about the agency's regular meeting and closed session agendas, minutes, contracts, purchase orders, and the agency's conflict of interest code.[4] Prompt disclosure of this information by the agency will avoid the issuance and serving of search warrants on the agency. Lack of cooperation may also create the public appearance of stonewalling, collusion, or improper withholding of information. However, to protect the agency's confidential information such as personnel records, closed session tape recordings and records, appointment of a special master and in-camera judicial hearing may be necessary (Professional Conduct Rule 3-100(A)). The District Attorney should be required to have a search warrant before an agency hands over any confidential or privileged information.

5. Research All Applicable Case Law and Statutes Related To Conflicts of Interest

Other than the Penal Code's provisions, public officials and employees are governed by the PRA and Government Code section 1090, which deals with prohibited contracts. Conceivably, an individual who has violated Government Code section 1090 could also violate the PRA. However, someone who violates provisions of the PRA is not always subject to Government Code section 1090. Prosecutors generally defer to the FPPC on violations of the PRA.

6. Draft a Legal Opinion Regarding the Allegations and Determine Whether a Violation Has Occurred

Every agency attorney has the ethical obligation to act competently. Do not provide legal opinions that deal with the complex area of conflicts without consulting all legal authorities. The consequences are extremely serious, as demonstrated in *People v. Chacon* (2007) 40 Cal 4th 558. The defendant, while a member of the Bell Gardens City Council, sought and obtained appointment as city manager after the city attorney approved the contract. The councilwoman's conduct in securing that position resulted in criminal charges under Government Code Section 1090 being brought by the Los Angeles District Attorney. The Supreme Court held that an official cannot escape liability for conflict of interest violations by claiming to have been misinformed by a city attorney.

Ultimately, all violations are fact specific and any legal opinion will stand or fall on its accuracy and analysis of the facts applied to the relevant legal doctrine. The legal opinion should explain the factual situation and analyze whether a violation has occurred based on the current status of statutory and case law. Share this information with the agency manager and the board, without the member who is the subject of the allegations. Sharing any information with the alleged suspect should be done only after consultation with the District Attorney or Attorney General. Even a perception of interfering or impeding the District Attorney's investigation is inappropriate and poor public policy.

An attorney who concludes that a violation has occurred should advise the agency board of the conflict and explain to the individual under investigation that he or she may wish to retain their own attorney. Your disclosure to the board is especially important because a conviction under the PRA or Government Code section 1090 will void any contract implicated by the PRA or Section 1090 violation that the board has previously approved.[5]

7. Advise the Individual Charged with Committing an Ethical Violation That They Should Retain Independent Counsel

If the District Attorney, Attorney General or the FPPC decide to file a complaint against a member of the board, council or staff, the agency attorney may advise the suspect or defendant, if a complaint has been filed, to retain independent counsel. At this point, the individual charged with the violation will need someone who specializes in criminal or PRA defense.[6] In addition, agency attorneys should avoid representing more than one client in a matter in which the interests of clients potentially conflict. Ethical violations are often predicated on self-dealing and result when a public official or decision-making employee places his own interests above the interests of the public. When a public official or employee has committed an ethical violation, arguably their interests are always adverse to the government entity's interests. The entity has an interest in correcting the wrong, while the individual has an interest in protecting him or herself. The agency attorney represents the interests of the agency and not the individual charged.

Moreover, a city attorney may be precluded from representing the individual in

a criminal matter under state statutory law. Under Government Code section 41805, city attorneys and their firms may represent criminal defendants only if: (1) the city attorney does not have any prosecutorial responsibilities, (2) the city attorney has obtained a release of any prosecutorial responsibilities from the city he/she represents, (3) the city attorney informs the criminal defendant of the apparent conflict, and (4) the city attorney receives from the criminal defendant a waiver of "any rights created" because of the potential conflict.

8. Advise Client of Its Ability to Either Provide Criminal Defense or to Deny a Request

Should the agency pay for the individual's administrative, civil or criminal defense? Government Code sections 995.4, 995.6 and 995.8 affirmatively declare that public entities are not required to provide the defense of a civil, administrative or criminal action brought against its public officials or any employee, but instead permits the entities to provide defenses in certain circumstances.[7] For example, where a criminal action is involved, the entity is given the right to refuse the employee a defense arbitrarily, with only a permissive right to compensate him/her for attorney's fees and costs in the instances noted.[8] In order to provide a criminal defense, the agency board would have to make findings under Government Code section 995.8 that: (1) the prosecution was brought on account of the employee or board member acting within the course and scope of his/her public employment, (2) the payment of the employee or board member's criminal defense is in the best interest of the agency, and (3) the employee or board member acted, or failed to act, in good faith without malice and in the apparent best interests of the agency.

IV. HIGH PROFILE PROSECUTION ENFORCEMENT AREAS

Outside the provisions of the PRA (Gov. Code, § 87100), prosecutors generally focus on six high profile ethical compliance areas: (1) open meeting laws (Gov. Code, §§ 54950 *et seq.*), (2) bribery (Penal Code, §§ 67 *et seq.*), (3) misuse of public funds (Penal Code, § 424), (4) embezzlement (Penal Code, §§ 503 *et seq.*), (5) grand theft (Penal Code, § 487), and (6) conflicts of interest (Gov. Code, § 1090).

These six areas are important examples of California's complex array of laws that apply to governmental ethics as well as potential civil and criminal liability in public service for unethical conduct. The laws apply to those who act intentionally and also to those who act in good faith but on bad advice. It is important also to understand that the Political Reform Act merely sets the minimum standards for ethical conduct in public office. To promote good government and avoid negative publicity and potential civil and criminal liability, every agency on a regular basis should engage in review and self-assessment of its code of ethics and its effectiveness within the organization's culture. Agencies may also wish to consider adopting value-based codes of ethics, as over 35 California cities have done.

Public agencies should also bear in mind that AB 1234, which took effect in January 2006, requires local governments to adopt new expense reimbursement policies meeting certain parameters, and also imposed a new ethics training mandate. Each local agency official is required to receive at least two hours of training in general ethics principles and ethics laws relevant to his or her public service every two years pursuant to Government Code section 53235(b).

Eleanor Roosevelt said it best: *"A good public servant becomes so at a high cost of personal sacrifice. We need such men and women, when we find them we owe them our gratitude and respect"*...especially as each individual office holder tries to understand and deal with the ethical pot holes and landmines of public service.

ENDNOTES

[1] Rules Prof. Conduct, rule 3-600(A).

[2] Rules Prof. Conduct, rule 3-600(D).

[3] California Rules of Professional Conduct, Rule 3-310(C) requires each client to provide informed written consent before an attorney can represent clients with actually or potentially conflicting interests.

[4] *See* Gov. Code, § 87300-87313.2

[5] *See* Gov. Code, § 91003; Gov. Code, § 1090.

[6] Most city attorneys do not have the learning and skill necessary to provide an adequate defense. If your client wishes you to provide the criminal defense, has provided its informed written consent for dual representation, and you have fulfilled the statutory requirements of Government Code section 41805, you may provide the criminal defense. However, if you are not competent in the area of criminal defense, you could only represent the individual charged if you have associated with or, where appropriate, professionally consulted another lawyer reasonably believed to be competent, or you have acquired sufficient learning and skill before your performance is required. (Rules Prof. Conduct, rule 3-110(C).)

[7] *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 176.

[8] *County of Sacramento v. Superior Court* (1971) 20 Cal.App.3d 469, 473.

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The California Legislature Should Establish Water Courts

By James L. Markman*

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It is the purpose of this article to advocate the legislative creation of special courts in California ("water courts") presided over by water judges, the proposed criteria for which are discussed below. The core purpose for the creation of water courts is to more efficiently administer California groundwater adjudications through the employment of judges already experienced in dealing with the arcane body of California water law. Adjudications in turn generate groundwater production administration and resource protection. Unfortunately, for the most part, groundwater production in excess of sustainable supplies has been a condoned circumstance in California for decades. Following is the latest iteration of the California Department of Water Resources concerning the continuous mining of California groundwater:

> "A comprehensive assessment of overdraft in the State's groundwater basins has not been conducted since Bulletin 118-80, but it is estimated that overdraft is between 1 million and 2 million acre-feet annually: Historical overdraft in many basins is evident in hydrographs that show a steady decline in groundwater levels for a number of years; [o]ther basins may be subject to overdraft in the future if current water management practices are continued; [o]verdraft can result in increased water production costs, land subsidence, water quality impairment, and environmental degradation; [f]ew basins have detailed water budgets by which to estimate overdraft; [w]hile the most extensively developed basins tend to have information, many basins have insufficient data for effective management or the data have not been evaluated; [t]he extent and impacts of overdraft must be fully evaluated to determine whether groundwater will provide a sustainable water supply; [m]odern computer hardware and software enable rapid manipulation of data to determine basin conditions such as groundwater storage changes or groundwater extraction, but a lack of essential data limits the ability to make such calculations; and [a]dequate statewide land use data for making groundwater extraction estimates are not available in electronic format."

The California State Water Resources Control Board's administrative jurisdiction to bring order to water production is limited to the surface and subsurface flows of stream systems. (Water Code, § 1200.) Controlling decision making relative to groundwater production rights and the distribution of costs needed to protect groundwater resources must emanate from the court system. Accordingly, if one accepts the premise that water law is complex and foreign territory for the vast majority of judges and justices in the California court system, it is clear that a group of expert judges should be allocated the disposition of groundwater production disputes.

I. WATER COURTS IN OTHER STATES

Water courts have been established in other states, notably Montana (see Mont. Code Ann. § 3-7-101 [1885]) and Colorado.

Colorado's extensive water court system and its functions have been described as follows:

> "The district courts of the counties within a water division collectively acting through the water judge have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge may act with respect to water matters in that division. Water matters are only those matters specified by law to be heard by the water judge of the district courts, including determinations of water rights and conditional water rights, determinations that conditional water rights have become water rights by reason of the completion of the appropriations, determinations with respect to changes of water rights and approvals of plans of augmentation, applications for findings of reasonable diligence, approvals of proposed or existing exchanges of water, determinations of rights to nontributary groundwater outside of designated groundwater basins, and approval to use water outside the state pursuant to West's C.R.S.A. § 37-81-101.... The Colorado Supreme Court has held that the water judge's exclusive jurisdiction extends to review of the rules and regulations of the state engineer, and it has stated that nontributary water and abandonment of a water right are included within the term 'water matters.' In addition to exclusive jurisdiction over water matters, the water judge, as a district court judge, has jurisdiction over other matters implied in article VI, section 9(1) of the Colorado Constitution and West's C.R.S.A., § 37-92-203(1), and has the power to decide issues affecting water matters. As the

meaning of 'water matters' is litigated, more items will undoubtedly be included within it. The water judges have no jurisdiction, however, over matters involving designated ground water. These are committed exclusively to the administrative agencies and courts prescribed by the Colorado Ground Water Management Act."[1]

Arizona's initial disposition of a groundwater production rights dispute is made by its department of water resources. Jurisdiction for judicial review of such a decision is vested in superior court judges with water experience specifically designated to do so by the Arizona Supreme Court. (See Arizona Rev. Stat. Ann. § 45-401 (1980).) The reason why Arizona's legislature created a structure for the application of administrative and judicial expertise to the disposition of groundwater disputes is explained as follows:

"The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective....It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state."[2]

II. CALIFORNIA'S SITUATION

The rationale for the creation of specialized water courts to adjudicate groundwater rights and disputes certainly applies in California, a state lacking administrative machinery to resolve or aid in resolving such disputes. California also is a state which depletes its groundwater resources on a continuous basis. The legislative description of Arizona's groundwater issues stated above mirrors the situation in California. Efficient and legally accurate court dispositions of California groundwater disputes are needed now.

As stated above, the court system offers the only available mandatory process for administering groundwater disputes. In multiple party circumstances often involving hundreds of producers and claims to production rights, a party seeking adjudication is able to compel all producers to participate in the process and thereby may achieve long term resource protection through the establishment of a court supervised management plan (often referred to as a physical solution). The court retains continuing jurisdiction in such a case and thus is required to make decision after decision impacting the basin and water producers. However, court adjudications are often initially more time consuming and expensive than should be the case, at least in part due to the fact that judges dealing with these matters often lack any prior exposure to the water rights legal literature replete with cases exceeding fifty pages in length. In addition, parties are able to move the cases from county to county and from judge to judge utilizing available legal devices, thereby generating delays and costs.

The pending Santa Maria Basin case (*Santa Maria Valley Water Conservation District v. City of Santa Maria, et al.* and related cross-actions, lead case No. CV 770214, Santa Clara County Superior Court) presents an unfortunate demonstration of how a groundwater adjudication may be delayed and moved from venue to venue and from judge to judge as reflected in the following chronology:

July, 1997—case filed in San Luis Obispo County; July, 1997-November, 1997—case pending before first Superior Court Judge; November, 1997—case transferred to Santa Clara County pursuant to California Code of Civil Procedure Section 394 motion; November, 1997-February, 1999—case heard in Santa Clara County Law & Motion Departments; August, 1998-March, 1999—cross complaints seeking water rights declarations and the imposition of a physical solution are filed by major public water purveyors; June, 1999—case assigned for all purposes to second Superior Court Judge; June, 1999—second Superior Court Judge is peremptorily challenged and the case is assigned for all purposes to third Superior Court Judge; June, 1999-July, 1999—over 15 Quiet Title Actions are filed in San Luis Obispo and Santa Barbara County by overlying agricultural water producers seeking a declaration of paramount rights to produce water from the Santa Maria Basin and to control storage space therein; April, 2001—third Superior Court Judge is peremptorily challenged when a new opportunity to do so is created by an order consolidating the above-referenced quiet title actions with the main action in Santa Clara County; April, 2001—The case is assigned to fourth Superior Court Judge for all purposes; February, 2002—fourth Superior Court Judge is elevated to the Court of Appeals and the case is assigned to fifth Superior Court Judge for all purposes.

It is instructive to compare the efficient structure for dealing with water rights issues established in Colorado described above with the manner in which the Santa Maria Basin case has been moved and delayed by parties making use of available California Civil Procedure machinery. It seems clear that if water courts were established in California, decisions would be generated more quickly. If those courts are manned by persons familiar with applicable legal principles and precedents, those decisions would likely be more legally sound and would be less likely to generate appeals. That rationale already is employed in Superior Courts which establish California Environmental Quality Act panels, writs and receivers departments and other specialized courtrooms in which experts in certain subject matter preside.

Another demonstration of the need for judicial water law expertise occurred relatively recently in the Chino Basin adjudication, a

multiparty case involving the administration of approximately 140,000 acre-feet of annual groundwater production from a groundwater basin in San Bernardino County. (San Bernardino County Superior Court Case No. RCV 51010.) Judgment was entered in that case in 1978. The Board of Directors of a local public entity, Chino Basin Municipal Water District (now known as Inland Empire Utilities Agency), was then appointed Watermaster, the court's administrator of the judgment, and played that role for approximately twenty years. Then, in the late 1990s, a motion was filed to remove that board from its Watermaster position and replace it with a board composed of persons elected by vote of the parties producing water. In dealing with that motion, the judge recognized the need for assistance in dealing with the barrage of complex arguments hurled at him by the seasoned water lawyers who represented water producers. With the consent of the warring factions of water producers, he appointed both outside counsel and an independent engineer to advise him, the costs of which were assessed to the water producers.

That practice has continued to the present time. Parties to that action not only pay for their own attorneys and engineers and for a complex system of committees and an elected Watermaster board, but also in essence employ an attorney and engineer to provide independent advice to the court. The appointment of a judge with experience in water rights issues who, among other duties, presides over all groundwater matters in a described district would obviate the need for such additional independent lawyers and engineers to aid courts.

III. THE SANTA MARIA EXAMPLE

Following are a few examples of the issues before the court in the Santa Maria Basin adjudication, issues emanating from murky language embedded in lengthy cases and "spun" in numerous directions by able water counsel:

A. Deprioritizing Unexercised Overlying Rights

Unexercised overlying rights of parties in an overdrafted basin as to which a judgment has quantified prescriptive rights and self-help rights would be deprioritized as compared to these quantified rights. But, in what other circumstances and as to what other type of water production would unexercised overlying rights be deprioritized?

In *Wright v. Goleta Water District* (1985) 174 Cal.App.3d 74, the court grudgingly conceded the fact that overlying production could be increased in the future while maintaining a priority position over appropriative rights and would proportionately reduce that portion of the safe yield available to other overlying producers. Conversely, in *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, the California Supreme Court indicated that at least in the context of a State Water Resources Control Board stream adjudication, priority rights could be deprioritized and quantified to create a sense of certainty which would allow all persons relying on the same water resource to plan their activities in accordance with the amount of water available to them. This need for certainty in water resource planning and the fact that continuing to recognize a priority in unexercised overlying rights would impede management of groundwater resources was recognized in footnote 13 of *City of Barstow v. City of Adelanto* (2000) 23 Cal.4th 1224:

> "The *Wright* court refused to apply *Long Valley*, *supra,* 25 Cal.3d at page 350, to limit the scope of an overlying owner's future unexercised groundwater right to a present appropriative use, because the comprehensive legislative scheme applicable to the adjudication of surface water rights and riparian rights is not applicable to groundwater. (*Wright, supra*, 174 Cal.App.3d at pp. 87-89.) Although we do not address the question here, *Wright* does suggest that, in theory at least, a trial court could apply the *Long Valley* riparian right principles to reduce a landowner's future overlying water right use below a current but unreasonable or wasteful usage, as long as the trial court provided the owners with the same notice or due process protections afforded the riparian owners under the Water Code. (See Wat. Code, § 1200 *et seq.*; *Wright, supra*, 174 Cal.App.3d at pp. 87-89.) If Californians expect to harmonize water shortages with a fair allocation of future use, courts should have some discretion to limit the future groundwater use of an overlying owner who has exercised the water right and to reduce to a reasonable level the amount the overlying user takes from an overdrafted basin."

In the Santa Maria adjudication, there is one party whose existence should cause concern among all other water producers. That party is an oil company with large land holdings overlying the Basin from which very little water has been produced to date. Much of the property is susceptible of agricultural development so that there is a potential for increased overlying production. The issue presented is whether an adjudication which is based upon a factual finding that there is equilibrium in the Basin, and a quantification of production rights in priority order should also deprioritize or, at least, quantify unexercised overlying rights. In the Santa Maria adjudication, overlying agricultural production could be given the first priority in a quantified amount and appropriative production of existing surplus could be given second priority in quantified amounts. If the footnote in *Barstow* quoted above is implemented, the judgment would protect those quantified production rights against future increased overlying production, thereby deprioritizing that unexercised production. Were that to occur, parties who rely upon groundwater in the area would know how much of their water needs could be met by Basin production and they could plan accordingly. If, on the other hand, the appropriative rights could be reduced to zero by presently unexercised overlying production and each agricultural interest could have its correlative right reduced by presently unexercised overlying production, no certainty in the availability of groundwater would be afforded to any producer. One must question whether the priority of unexercised overlying rights is compatible with basin management through adjudication, the only practical method of management available.

B. Who Owns Storage Rights?

The issue of who owns storage space in the Basin also is pending in the Santa Maria Basin adjudication. Certain overlying producers have asserted a right to the storage space beneath their property. They argue that that right is equivalent to the right of a property owner whose property is converted to surface reservoir use. That is, if a public entity is going to take the subject property and put it to public use, there is a value in that property and the public entity must pay to the owner of that property that value. Those allegations were the subject of demurrers.

To support the demurrers, the public entities first argued that entities being forced to pay for storage space would violate Article 10, § 2 of the California Constitution requiring that water be beneficially used to the fullest extent possible. Costs would be added to and could collapse conjunctive use programs.

As to "storage" of return flows from imported water, the public entities argued that the Supreme Court in *City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, recognized the right of Los Angeles to capture return flows of imported water so long as those return flows represent a net benefit to the groundwater basin.

Most interestingly, the public entities argued that storage space in a groundwater basin could not physically be subjected to the possession, dominion or control of the owner of the surface of the ground. In that regard, the public entities cite *State of California v. Superior Court of Riverside County* (2000) 93 Cal. Rptr. 2d 276 at 286, as follows:

> "[I]t has long been held by the courts of this state that '...running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership.' (*Kidd v. Laird* (1860) 15 Cal. 161, 179-180.) Indeed, groundwater, under the absolute dominion rule, was held comparable to wild animals—*ferae naturae*—and was considered subject to 'ownership' by the landowner only so long as it was under his land. As a bird, or deer, 'belonged' to a landowner only so long as it was on his land, so was 'ownership' of groundwater limited; when it flowed away, so flowed to any 'ownership.'"[3]
>
> Our Supreme Court has made the similar analogy of water to 'the air, which cannot be said to be possessed or owned by any person unless it is confined within impervious walls.' (*Palmer v. Railroad Commission* (1914) 167 Cal. 163, 168, 138 P. 997.) The same instinctively appealing logic applies to 'ownership' by the State when the essentially evanescent and/or transitory character of water in its natural state is considered.

Notwithstanding the above-stated arguments, demurrers were overruled leaving for trial the disposition of the control and ownership of storage space and the potential right to be compensated therefor. At trial, the landowners will be required to present their theory as to how to measure the proportionate share in the storage space each of them owns and how much that proportionate share may be worth. Will they claim a share based on proportionate surface area? Will the presence or amount of water bearing alluvium underlying each parcel be required to be measured? No theory on proportionate value has yet been expressed.

The issues discussed above expose only a few examples of groundwater law complexities. It seems unfair to expect the prompt and accurate disposition of such issues by judges with normal case loads and no prior water rights experience.

IV. CONCLUSION AND IMPLICATIONS

It seems clear that the creation of water courts and/or water judges would facilitate groundwater resource preservation, generate efficiencies in litigating rights to produce groundwater and more quickly bring certainty of costs and availability of supply to California water producers. Some water court proposals have sought to avoid interfering with the jurisdiction of the State Water Resources Control Board. It has been suggested that a better approach would be to provide exclusive water court jurisdiction for a wide variety of water rights disputes. Conversely, suggestions have been made to simply require water panels, similar to California Environmental Quality Act panels, to be established in large counties to generate the judicial expertise needed to deal with water issues. However, the first suggestion (broader jurisdiction) could generate opposition from the State Water Resources Control Board while the second (court panels) still would allow litigants to challenge expert water judges without cause and move groundwater cases from county to county.

Attorneys dealing with groundwater litigation are invited to provide suggested modifications or other input on the concepts and proposals contained in this article and are urged to support legislation that would create water courts and/or water judges. California needs the benefit of a judiciary equipped to efficiently adjudicate complex groundwater issues, thereby generating certainty of supplies and costs to producers while protecting California's groundwater basins.

ENDNOTES

[1] Stricklin, Cathy, *West's Colorado Practice Series, Methods of Practice*, A Group of Colorado Practice Experts, Part VI. Real Estate Transactions, Chapter 76. Water Law, Wayne B. Schroeder, §§ 76.3, 76.4 (1998).

[2] Ariz. Rev. Stat. Ann. § 45-401 (1980).

[3] *Westmoreland Cambria Nat. Gas Co. v. DeWitt* (1889) 130 Pa. 235, 18 A. 724.

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Litigation & Case Law Update

*Compiled by Richard C. Miadich**

The purpose of the Litigation & Case Law Update is to alert the *Journal's* readers to recent judicial decisions touching areas of public law.

LOCAL GOVERNMENT/CHARTER CITIES/STATE PREEMPTION

State law preempts local regulation of penalties available for state crimes involving controlled substances and prostitution.

The City of Stockton, a chartered city, enacted an ordinance permitting the forfeiture of any vehicle used to solicit an act of prostitution or to acquire or attempt to acquire any controlled substance. Several taxpayers brought suit to have the ordinance enjoined and declared void on the grounds that it conflicted with state law. The superior court sustained the City's demurrer and entered judgment in the City's favor after plaintiff-taxpayers failed to amend the complaint. The Court of Appeal reversed, holding that the vehicle forfeiture provisions were preempted by state law, including the California Uniform Controlled Substances Act ("UCSA"). The California Supreme Court granted review.

In *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, the Court affirmed the Court of Appeal. It held that the UCSA constitutes a comprehensive statutory scheme that fully occupies the field of penalizing controlled substance-related offenses. Under the UCSA, vehicle forfeiture is permitted only upon proof beyond a reasonable doubt of the vehicle's use to facilitate certain serious drug crimes. By contrast, the Stockton ordinance authorized forfeiture upon a showing by a preponderance of evidence that the vehicle was used to *attempt* to acquire *any amount* of any controlled substance – conduct for which the UCSA does not authorize vehicle forfeiture as a penalty. The court also found that certain provisions of the Vehicle Code expressly preempted the portion of the ordinance authorizing forfeiture of vehicles used in connection with the crime of prostitution.

CALIFORNIA PUBLIC RECORDS ACT/PRIVACY RIGHTS

Salary information for individual public employees – including peace officers – is not exempted from disclosure under the California Public Records Act.

Newspaper reporters made a request under California Public Records Act ("the Act") that the City of Oakland provide them with the names, job titles, and gross salaries of all City employees who earned $100,000 or more in fiscal year 2003-2004. The City agreed to disclose salary and overtime information for each job classification, but refused to provide salary information linked to individual employees, claiming that individually identified salary information is exempt from disclosure. In response, the newspapers sought a writ of mandate in the superior court to compel the City to disclose the requested salary records. The superior court granted the petition for writ of mandate. After the Court of Appeal denied petitions by two public employee labor unions seeking review of the superior court's decision, the California Supreme Court granted review.

In *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 64 Cal. Rptr. 3d 693, the court affirmed the Court of Appeal, holding that "well-established norms of California public policy and American public employment exclude public employee names and salaries from the zone of financial privacy protection." The court rejected the argument advanced by the labor union petitioners that the salary information sought fell within the Act's exemption for "personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (Gov. Code, § 6254 (c).) Assuming for the sake of discussion that the requested salary information constituted "personnel . . . or similar files," the court concluded that, on balance, disclosure did not constitute an "unwarranted invasion of personal privacy" under the facts presented.

Certain classes of information are considered private when "well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity." Even before incorporated into the California Constitution, courts had long acknowledged a legally recognized privacy interest in persons' private financial information. By contrast, the information requested by the newspapers related to financial matters directly related to the individual's public employment. Disclosure of such information is consistent with the strong public policy embodied in the Act and in the state constitution recognizing the people's right to transparency in government. This includes salary information of public employees serving as peace officers because neither the language nor history of Penal Code section 832.7 – pertaining to peace officer personnel records – evince a legislative intent to exempt salary information from disclosure under the Act.

CONFLICTS OF INTEREST/ GOVERNMENT CODE § 1090

Exemption from prohibited financial interests under Government Code section 1090 for contracts involving "salary" includes contracts concerning pension benefits. However, exemption does not apply to contracts for pension benefits that directly impact a decision maker's own department or employing unit.

Former members of the San Diego Public Employees Retirement Board were charged with three felony counts of violating

Government Code section 1090 for allegedly having agreed to allow the City of San Diego to under fund its pension system in exchange for the City agreeing to provide increased benefits to city employees, including the former retirement board members themselves. They responded by moving to set aside the information under Penal Code section 995 on the grounds that section 1090 did not apply to their actions, and, even if it did, they fell within section 1090.5(a)(9) which exempts "salary" from prohibited financial interests. The superior court denied the motion, reasoning in part that when the Legislature in 1999 amended section 1090.5(a)(9) to apply to contracts involving "salary" instead of "compensation," it intended not to include contracts for pension benefits within the scope of the exemption. After the Court of Appeal denied the former board members' writ of prohibition, the California Supreme Court granted review. The Court then transferred the case back to the Court of Appeal with orders to vacate its previous denial and direct the superior court to show cause why the relief requested should not be granted.

In *Lexin v. Superior Court* (2007) — Cal. Rptr. 3d —, 2007 WL 2569264 (Cal.App.4 Dist.) the Court of Appeal held that contracts for pension benefits are within the scope of the "salary" exemption in section 1090.5(a)(9). The Court of Appeal relied on an opinion by the California Attorney General concluding that for purposes of section 1090, "salary" may be construed to include retired employees' health benefits. It also noted that the Fair Political Practices Commission has construed the "salary" exception to the definition of "financial interest" in the conflict of interest provisions of the Political Reform Act to include payments for pension benefits. Since the 1999 legislative amendments to section 1090.5(a)(9) were likely intended to make section 1090 more closely track the language in the Political Reform Act, the Court of Appeal concluded that the superior court had erred in finding that the contract involving pension benefits at issue did not fall within the section 1090.5(a)(9) exemption.

However, the Court of Appeal went on to hold that because the pension benefits contract at issue directly impacted each of the former board members' departments or employing units, the salary exemption in section 1090.5(a)(9) did not apply. Accordingly, it denied the former board members' petition for a writ of prohibition.

ADMINISTRATIVE LAW/ HEALTH LAW

In opinion on rehearing, Third District Court of Appeal clarifies that under1994 legislation, all physician owned and operated surgical clinics are to be regulated exclusively by a division of the Medical Board of California, whereas surgical clinics operated by non-physicians are subject to licensure by the Department of Health Services.

As reported in the Spring 2007 Litigation Update, the Third District Court of Appeal in *Capen v. Shewry* (2007) 147 Cal.App.4th 680, affirmed a superior court decision declaring a Department of Health Services policy interpreting Health & Safety Code section 1204(b)(1) (licensure of surgical clinics) void on the basis that the policy amounted to an underground regulation that had not been enacted in compliance with the rulemaking requirements of the California Administrative Procedures Act. The policy reflected the Department's effort to resolve an apparent ambiguity in section 1204(b)(1) – to wit, whether a surgical clinic wholly owned and operated by one physician in which non-owner, non-lessee physicians will practice was subject to licensure under section 1204(b)(1).

However, rather than returning the question of section 1204(b)(1)'s interpretation to the Department for

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consideration pursuant to the APA's rulemaking procedures, the Court of Appeal determined that since the issue involved only "simple interpretive policy," it was in as good of a position as the Department to interpret the statute. In its original opinion, the Court of Appeal interpreted section 1204(b)(1) to mean that surgical clinics owned and operated by more than one physician in group practice were not subject to licensure by the Department. It reasoned that under such arrangements, the owners/physicians had sufficiently strong economic and managerial interests in safe operation of the clinic to justify leaving such clinics "unregulated." However, surgical clinics that, like plaintiff's, were owned and operated by only one physician *were* subject to licensure by the Department.

Following issuance of its original opinion, the Court of Appeal granted rehearing to determine whether it had failed to consider that impact of 1994 legislation on its interpretation of section 1204(b)(1). Specifically, in 1994 the Legislature enacted laws subjecting unlicensed surgical clinics to regulation by a division of the Medical Board of California. In *Capen v. Shewry*, — Cal.Rptr.3d —, 2007 WL 2717781, the Court of Appeal explained in a new opinion issued on rehearing that the intent of these laws was to make *all* surgical clinics owned and operated by physicians subject to regulation by the Medical Board, while surgical clinics operated by non-physicians are to be regulated by the Department of Health Services. Thus, the Court of Appeal's opinion on rehearing makes clear that plaintiff's surgical clinic is *not* subject to regulation by the Department under section 1204(b)(1), but is instead subject to regulation only by the Medical Board.

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